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## ON THE EXPULSION OF FOREIGNERS FROM ROME

BY RICHARD WELLINGTON HUSBAND

From the half-imaginary accounts by Livy and Cicero of the history of the early kingship in Rome, we derive the impression that foreigners were made welcome in the city, and that their desire to establish themselves there was a proof of the greatness of primitive Rome and of the excellence of its government. We gain no idea whatsoever from these two writers that the citizens at any time objected to the influx of foreigners until the last two centuries of the Republic. Evidently a feeling of uneasiness then sprang up on account of the almost continuous arrival of new foreigners, who made the orderly conduct of public business more difficult. For this reason there arose a series of executive decrees and legislative enactments on the subject, which continued almost to the close of the republican period. But actual expulsion of foreigners from Rome was very infrequent, and seems to have been felt by some citizens as an extremely harsh and possibly unnecessary measure. The feeling of Cicero toward the phenomenon of expulsion in general is thus expressed: "Nihil acerbius socii et Latini ferre soliti sunt quam se, id quod perraro accidit, ex urbe exire a consulibus iuberi. Atque illis tum erat reditus in suas civitates ad suos Lares familiaris, et in illo communi incommodo nulla in quemquam propria ignominia nominatim cadebat."<sup>1</sup> This statement, very general in character, merely gives the information that even allies and those possessed of Latin rights had occasionally been banished from the city, but this was very rare, and, whenever it had happened, no disgrace ever attached to the individual; that is to say, it was not the habit of the Romans to institute definite criminal proceedings on the basis of the false assumption of the rights of citizenship. In all such cases the resident alien was permitted to return to his home and resume his civic position in his own town.<sup>2</sup>

<sup>1</sup> *Sest.* 30; cf. Livy xli. 24.

<sup>2</sup> This interpretation is confirmed by the use of the imperfects *erat* and *cadebat*, as well as by the word *tum*.

Dionysius, in treating of the events of the year 486 B.C., gives what purports to be the history of an attempt to expel Latins and Hernicans from Rome,<sup>1</sup> and, although Mommsen has shown that the story has little foundation in fact,<sup>2</sup> it is interesting because it probably represents fairly accurately the motives which inspired the Romans to form such resolutions, as often as they made efforts in that direction. The question arose over the distribution of some newly acquired territory, and the Senate debated whether plots of land should be given only to Romans, or should be granted also to Latins and Hernicans, with whom they had recently made treaties. One of the consuls favored the second alternative, and when the matter was to be submitted to the people for their decision he caused large numbers of the Latins and Hernicans to assemble in Rome, in the hope that many of them might succeed in casting their votes also, and their right to do so not be challenged. It was this deliberate attempt at procuring the false assumption of civic rights that induced the other consul to propose the expulsion of the foreigners from the city. Expulsion was the remedy frequently adopted for illegal usurpation of the franchise.

The first undoubted instance of the expulsion of foreigners took place in the year 187 B.C. Livy's account of the matter is this:

Legatis deinde sociorum Latini nominis, qui toto undique ex Latio frequentes convenerant, senatus datus est. His querentibus magnam multitudinem civium suorum Romam commigrasse et ibi censos esse, Q. Terentio Culleoni praetori negotium datum est, ut eos conquireret, et quem C. Claudio M. Livio censoribus postve eos censores ipsum parentemve eius apud se censum esse probassent socii, ut redire eo cogeret ubi censi essent. Hac conquisitione duodecim milia Latinorum domos redierunt, iam tum multitudine alienigenarum urbem onerante.<sup>3</sup>

Thus, delegates of the Latins from all parts of Latium came to Rome and complained that many who were citizens of towns had removed to Rome and secured the entry of their names in the Roman records. This movement was so extensive that the population of the towns was decreasing. The Senate, therefore, after studying the situation, voted that all those who had settled in Rome since the year 204 B.C. should be sent back to their own towns. In order to carry out this measure effectively and equitably, an investigation—

<sup>1</sup> viii. 68-76.

<sup>2</sup> *Hermes*, V, 236 ff.

<sup>3</sup> xxxix. 3.

*conquisitio*—was to be conducted by a praetor, who should inquire—*conquireret*—whether a person was foreign born, and, if he found that to be the case, whether he had removed to Rome later than the specified date. It is significant that the delegates asserted that the persons in question were “their” citizens, that is to say, they had not properly acquired the rights of the Roman franchise. As early as this time Latins, and other Italians, could obtain practically all the rights of Roman citizenship under certain conditions and contingent upon the nature of the special treaties between Rome and their towns. One who emigrated from his own town to Rome had a limited right of franchise; by complete expatriation he could acquire all the privileges of citizenship; one who had left a son at home could enjoy the franchise at Rome; magistrates of towns received Roman citizenship.<sup>1</sup> Under all these circumstances it is not surprising that many persons among the thousands of Italians who were living, and doing business, in Rome, should seek to have their names entered surreptitiously, or by false pretenses, upon the censors’ lists as Roman citizens, without fulfilling the terms of the treaties with Rome.

The second instance of expulsion occurred just a decade later, in the year 177 B.C. Livy gives the story briefly:

Legem dein de sociis C. Claudius tulit ex senatus consulto, et edixit, qui socii ac nominis Latini ipsi maioresve eorum M. Claudio T. Quinctio censoribus postve ea apud socios nominis Latini censi essent, ut omnes in suam quisque civitatem ante Kal. Novembres redirent. Quaestio, qui ita non redissent, L. Mummio praetori decreta est.<sup>2</sup>

This situation differs from that of ten years earlier only in the fact that the present action was based on a law passed by the people, following a recommendation by the Senate, while the other was merely an executive order emanating from the Senate alone. It is clear that this measure had to do with the present condition only, and did not look forward to the future, but it illustrates the interesting fact that large questions concerning the acquisition of citizenship were decided by the citizen body.<sup>3</sup> The circumstances leading up to the enactment are related by Livy in the preceding chapter:

Postea his quoque imaginibus iuris spretis, promiscue sine lege, sine stirpe in civitatem Romanam per migrationem et censum transibant. Haec ne

<sup>1</sup> App. *B.C.* i. 23; Livy xxv. 3. 16; xli. 8. 9; Cic. *Pro Caecina* 102; Asc. *In Pison.*, p. 3.

<sup>2</sup> xli. 9. 9–10.

<sup>3</sup> Cf. Livy xxvi. 33. 10.

postea fierent, petebant legati, et ut redire in civitates iuberent socios; deinde, ut lege caverent, ne quis quem civitatis mutandae causa suum faceret neve alienaret, et si quis ita civis Romanus factus esset, *civis ne esset*. Haec impetrata ab senatu.<sup>1</sup>

Evidently many had succeeded in evading the requirements for enrolment in Rome, and their fellow-citizens in the towns sought for their exclusion from the citizens' lists in Rome and their return to their own proper citizenship. In its purpose it is exactly like the decree of ten years before, but there is one important added feature. To attend to the cases of those who did not obey the order to depart from Rome, a *quaestio* was created and placed under the presidency of L. Mummius, a praetor. In the time of Livy the word *quaestio*, occurring in a legal paragraph, would inevitably be understood by a reader to signify "a criminal court," and if the other meaning of the word, "investigation," came into his mind at all he would undoubtedly reject it immediately.<sup>2</sup> The power granted to the praetor must have been the power of *coercitio*, that is, the right to compel the observance of an executive order. If the order were not obeyed, *qui ita non redissent*, he could threaten prosecution. Who were foreigners and who were not foreigners would generally be quite evident, so that there would not often be need for an investigation of the facts, provided the measure contemplated a general expulsion of all foreigners, but cases might arise where the praetor would be forced to grant a hearing to those who claimed that they were Roman citizens by birth, or that they had acquired the citizenship legally. However, if this were what Livy meant, he would not have used the expression "those who did not return," but would have said "those who claimed that they were Roman citizens." On the whole, therefore, we are compelled to believe that this was a second instance of the attempt to purify the list of citizens, by placing the penalty of expulsion upon those who had been guilty of usurping the rights of citizenship. It is to be noticed also that this was a more thorough purification than the first, for it included all allies and those possessed of Latin rights. The phrase *socii ac nominis Latini* would include the

<sup>1</sup> xli. 8. 11-12.

<sup>2</sup> For the use of the word *quaestio* in the meaning of "a criminal court," or an investigation to ascertain the criminality of an action, cf. Livy iv. 51. 2; xxxviii. 55. 4; xxxix. 14. 6.

inhabitants of the whole of Italy,<sup>1</sup> whereas the earlier decree limited its operation to those of Latium itself.

But it is evident that this measure failed of its intended effect, or, through the carelessness of officials, was not strictly enforced. Livy says that only nine years later, in 168 B.C., a new effort was made to carry out its object:

Censa sunt civium Romanorum capita ducenta sexaginta novem milia et quindecim, minor aliquanto numerus, quia L. Postumius consul pro contione edixerat, qui socium Latini nominis ex edicto C. Claudii consulis redire in civitates suas debuissent, ne quis eorum Romae, et omnes in suis civitatibus, censerentur.<sup>2</sup>

This was merely a statement by the chief executive that he intended to enforce the measure enacted nine years earlier, and the object was to prevent further corruption in the voters' lists. It could not have been a thoroughgoing expulsion of foreigners, for Livy says that only those who had escaped the action of the former decree were affected by this one. The result of the new edict was that the number of names on the citizens' lists was diminished, and this again is proof that the expulsion was simply the penalty for an illegal action.

The banishment of the Greek philosophers and rhetoricians in the year 161 B.C. is of no particular consequence here, except that it shows the readiness of the Romans to get rid of undesirable persons by a method known to them from the Greeks. Nothing more is heard of the matter of expulsion for about forty years, when something of the kind was again carried out upon the initiative of a tribune named Pennus. This is not mentioned by the historians, but is known through a meager reference by Cicero:

Male etiam, qui peregrinos urbibus uti prohibent eosque exterminant, ut Pennus apud patres nostros, Papius nuper. Nam esse pro cive, qui civis non sit, rectum est non licere; quam legem tulerunt sapientissimi consules Crassus et Scaevola; usu vero urbis prohibere peregrinos sane inhumanum est.<sup>3</sup>

<sup>1</sup> For similar broad use of the phrase (with or without *ac*), cf. Livy xxxviii. 35. 9; xl. 19. 6; xl. 36. 6; xli. 8. 6.

<sup>2</sup> xlii. 10. 2-3.

<sup>3</sup> *De off.* iii. 11. 47.

The date of this resolution is 126 B.C.<sup>1</sup> It may be that Festus refers to the same episode when he writes:

Respublica multarum civitatum pluraliter dixit C. Gracchus in ea, quam conscripsit de lege p. Enni [Penni, Müller] et peregrinis, cum ait: eae nationes, cum aliis rebus, per avaritiam atque stultitiam res publicas suas amiserunt.<sup>2</sup>

If this correction of the text by Müller can be accepted, it is clear that the resolution proposed by Pennus was of the same nature as the earlier ones, for the words *avaritia* and *stultitia* can refer only to clumsy attempts to secure enrolment in the censors' lists. But even with this view, it is hard to see what he means by saying that these tribes lost their states, for there is no indication that a tribe ever suffered, by degradation or otherwise, through the misdemeanors of individual members of the tribe. In the uncertainty of the text of Festus, it is necessary to rely upon the very brief statement of Cicero, and this seems to indicate that the law of Pennus was much broader in its scope than any of the earlier laws. Cicero contrasts it in point of severity with the next law passed on the subject, that of Crassus and Scaevola, and almost expressly states that it had for its purpose a general expulsion of foreigners, and not simply the purification of the censors' lists.

Four years later, in 122 B.C., C. Gracchus made many of his important proposals in quick succession, prominent among which was one to confer citizenship upon Latins and allies. During the voting on these proposals, those not possessing the franchise were temporarily expelled from the city, according to Plutarch:

ἔπεισεν ἡ βουλὴ τὸν ὑπάτον Φάννιον ἐκβαλεῖν τοὺς ἄλλους πλὴν Ῥωμαίων ἅπαντας. γενομένου δὲ κινήματος ἀήθους καὶ ἀλλοκότου, μηδὲνα τῶν συμμάχων μηδὲ τῶν φίλων ἐν Ῥώμῃ φανῆναι περὶ τὰς ἡμέρας ἐκείνας, ἀντεξέθηκεν ὁ Γάιος διάγραμμα κατηγορῶν τοῦ ὑπάτου καὶ τοῖς συμμάχοις, αἱ μὲν ὡσι, βοηθήσειν ἐπαγγελλόμενος.<sup>3</sup>

And this is confirmed by the equally explicit account given by Appian:

ἐφ' ᾧ δὴ μάλιστα ἡ βουλὴ διαταραχθεῖσα τοὺς ὑπάτους ἐκέλευσε προγράψαι μηδὲνα τῶν οὐ φερόντων ψῆφον ἐπιδημεῖν τῇ πόλει, μηδὲ προσπελάζειν ἀπὸ τεσσαράκοντα σταδίων παρὰ τὴν ἐσομένην περὶ τῶνδε τῶν νόμων χειροτονίαν.<sup>4</sup>

<sup>1</sup> Cic. Brut. 109.

<sup>2</sup> Festus, p. 286.

<sup>3</sup> C. Gracchus 12.

<sup>4</sup> B.C. i. 23.

It is obvious that the measure so described was not a matter of permanent significance, and the only feature worthy of comment is that it was connected with an effort to prevent illegal use of the ballot, or, in other words, it aimed at maintaining the sacredness of the rights of citizenship. It is very similar to the unfounded story told by Dionýsius that the Latins and Hernicans were expelled during the voting upon a matter that was of immediate concern to them.

The next law upon this subject, commonly called the *lex Licinia-Mucia*, was passed in 95 B.C., on the motion of the two consuls L. Licinius Crassus and Q. Mucius Scaevola. It is mentioned more frequently than the earlier laws, partly no doubt because its influence was still felt while Cicero was at the bar, but partly also because it was somewhat instrumental in bringing about the social war. It is mentioned in the following passages: (1) Cic. *De officiis* iii. 11. 47, cited above; (2) Asconius *In Cornel.*, p. 67: "Hi enim legem eam de qua loquitur de redigendis in suas civitates sociis in suo consulatu tulerunt. Nam cum summa cupiditate civitatis Romanae Italici populi tenerentur et ob id magna pars eorum pro civibus Romanis se gereret, necessaria lex visa est, ut in suae quisque civitatis ius redigeretur"; (3) Scholia Bobiensia *In Cic. Sest.*, p. 296: "Huiusmodi leges ferri dicebantur de civibus redigendis. Qualem tulerunt L. Licinius Crassus et Q. Mucius Scaevola: ut redire socii et Latini in civitates suas iuberentur"; (4) Cic. *Brut.* 63: "[Lysias] est enim Atticus, quoniam certe Athenis est et natus et mortuus et functus omni civium munere, quamquam Timaeus eum quasi Licinia et Mucia lege repetit Syracusas"; (5) Cic. *Balb.* 48: "Itaque cum paucis annis post hanc civitatis donationem acerrima de civitate quaestio Licinia et Mucia lege venisset, num quis eorum, qui de foederatis civitatibus esset civitate donatus, in iudicium est vocatus?"; (6) Cic. *Balb.* 54: "Quodsi acerbissima lege Servilia principes viri et gravissimi et sapientissimi cives hanc Latinis, id est foederatis, viam ad civitatem populi iussu patere passi sunt [i.e., by successful prosecution for extortion], neque ius est hoc reprehensum Licinia et Mucia lege, cum praesertim genus ipsum accusationis et nomen et eius modi praemium, quod nemo adsequi posset nisi ex senatoris calamitate."



In the first of these passages, Cicero says only that the law was intended to prevent those who were not citizens from acting as citizens. But he contrasts it with other laws by saying that it was much less heartless than they, for it was concerned merely with a certain class of foreigners, those, namely, who had committed a wrongful act. And the fact that the law proposed by the two consuls was simply a preventive measure, *non licere*, makes it reasonably certain that there was nothing else in it, but that its sole object was to prohibit those who had illegally secured the rights that belonged only to Roman citizens from exercising those rights any longer. Nothing whatever is said about other foreigners, nor is anything said about punishment of this special class of offenders. Asconius is indefinite, an unusual thing for him, but he does give the information that the law was inspired by the efforts of foreigners to use civic rights unlawfully. The scholiast says explicitly that the law had for its purpose the expulsion of those who were not citizens, and probably that would be a fair interpretation also of the words of Asconius. The situation of Lysias in Athens, cited by Cicero in the *Brutus*, illustrates a position in which it would be absurd to attempt the application of this law. One who had lived as Lysias lived during his whole career should be secure in his position. And yet one cannot avoid the suspicion that Cicero meant to imply that the law could have been applied in the case of Lysias, however unreasonable and ungrateful the Athenians would have shown themselves if they had done so. Although Lysias spent much of his life in the public service of Athens, yet he lived as a resident alien, and never received civic rights. If the Licinian-Mucian law could be technically applied to him, it could be applied to any resident alien, and we should be obliged to conclude that it was broad enough to secure the expulsion of any foreigner. That would contradict the interpretation of the passage in the *De officiis* given above.

But the two passages cited from the speech in behalf of Balbus make the purpose of the law perfectly clear. The earlier shows that a very strict *quaestio* was established. This may mean, as said above, either "an investigation" or "a court of law." If the law were intended solely to procure the expulsion of foreigners, an investigation, in the case of any individual, would necessarily mean that the

individual was threatened with expulsion, but appealed to the person (probably a praetor, as in 177 B.C.) in charge of such investigations. But in that case the words *de civitate* would be much less appropriate than some such phrase as *de civibus redigendis* or *de peregrinitate* (or the republican equivalent for this post-Augustan word), because the investigation would not be held to determine whether he was a citizen, but to determine whether he was a foreigner. And again, the phrase *in iudicium vocatus* would be impossible in that situation, for, if the assumed foreigner demanded a hearing, the word *vocatus* could not be used, inasmuch as it necessarily applies only to the defendant who is summoned in a case, whereas this man would be the complainant. Cicero must mean, therefore, that persons were actually accused of being foreigners, and were made defendants in suits charging them with a false and criminal assumption of citizenship. The second of the passages cited from this oration merely shows another circumstance in which the law was not applied. The citizenship of successful prosecutors in cases of extortion was so obvious that no action was brought against them, and no effort was made to have them expelled.

Of the six passages cited in connection with the Licinian-Mucian law, three from Cicero are decidedly in favor of the view that the object of the law was the establishment of a court to try cases of alleged illegal assumption of the rights of Roman citizens. The fourth passage of Cicero is inconclusive. Of the two annotators, Asconius, while somewhat indefinite, seems to regard the law as one for the expulsion of foreigners from the city, and the scholiast unquestionably takes the same position. In a choice among such authorities we must prefer to follow Cicero, who was living at the time the law was in operation and pleaded cases under the law on this subject which followed next after the one discussed.

The last republican law upon this topic was proposed and carried by Gaius Papilius, a tribune of the year 65 B.C. Since it was under the provisions of this law that Cicero pleaded the cases of Archias and Balbus, it becomes especially important, and much discussion has arisen over its terms. Some scholars are of the opinion that these cases, and others of like nature, were mere investigations, carried on as an adjunct to one of the established courts, either criminal

or civil. Others believe that they were criminal prosecutions, directed against those of foreign birth who had unlawfully taken upon themselves the privileges of Roman citizens. But before discussing that question, it is desirable to obtain a summary view of the results of the examination of the earlier experiences of the Romans on the subject of their relation to foreigners. The case given by Dionysius may be omitted as unauthenticated, and that of the expulsion of the rhetoricians in 161 B.C. need not be considered, since it was an isolated phenomenon of the banishment of an undesirable element in the population. Apart from these, there were six occasions on which the Romans undertook to get rid of certain persons. A careful examination of the sources makes it appear almost a certainty that four of them, those of 187, 177, 168, and 95 B.C., had as their object the purification of the censors' lists by striking out those names which had been illegally inserted. A fifth, that of 122 B.C., excluded foreigners from the city only during the voting upon certain proposed laws, and it is, therefore, of no permanent importance. The sixth, that of 126 B.C., seems to have been the sole case of a general expulsion, and even there the evidence is not quite conclusive. It has also been shown by scholars that this whole matter was a part of the struggle between the senatorial and popular parties for the control of the government, and this view is supported by the fact that five of the six instances arose directly from the Senate, either by decree or by an act of legislation originating with the Senate. With this history in mind, one would naturally approach the law of Papius in the expectation of finding that its purpose also was the purification of records, rather than the expulsion of foreigners.

The law of Papius is mentioned eight times by ancient writers: (1) Scholia Bobiensia, p. 354, in the argument to the oration for Archias: "*reus factus lege Papia, quae lata fuerat ad eos coercendos qui temere et illicite civitatem Romanam usurpassent*"; (2) Scholia Bobiensia, p. 354, note on section 3 of the oration: "*hanc enim causam lege Papia de civitate Romana apud Q. Ciceronem dixit Archias*"; (3) Dio Cassius xxxvii. 9: *καὶ ἐν τούτῳ πάντες οἱ ἐν Ῥώμῃ διατρίβοντες πλὴν τῶν τὴν νῦν Ἰταλίαν οἰκούντων ἐξέπεσον Γαΐου τινὸς Παππίου δημάρχου γνώμῃ· ἐπειδὴ ἐξεπόλαζον καὶ οὐκ ἐδόκουν ἐπιτήδαιοι σφίσιν εἶναι ξηνοικεῖν*; (4) Cic. *Ad Att.* iv. 16. 12: "*absoluto*

Gabinio stomachantes alii iudices hora post Antiochum Gabinium nescio quem, e Sopholidis pictoribus, libertum atque accensum Gabinii, lege Papia condemnarunt"; (5) Cic. *Arch.* 10: "cum ceteri non modo post civitatem datam sed etiam post legem Papiam aliquo modo in eorum municipiorum tabulas inrepererunt, hic qui ne utitur quidem illis in quibus est scriptus, quod semper se Heracliensem esse voluit, reicietur?"; (6) Cic. *Balb.* 52: "iudices cum prae se ferrent palamque loquerentur, quid essent de lege Papia de M. Cassio Mamertinis repetentibus iudicaturi, Mamertini publice suscepta causa destiterunt. Multi in civitatem recepti ex liberis foederatisque populis sunt; nemo umquam de civitate accusatus, quod aut populus fundus factus non esset, aut quod foedere civitatis mutandae ius impediretur"; (7) Cic. *De off.* iii. 11. 47, cited above; (8) Valerius Maximus iii. 4. 5: "Non parvus consulatus rubor M. Perpenna est, utpote [quam] consul ante quam civis, sed in bello gerendo utilior aliquanto rei publicae Varrone imperator: regem enim Aristonicum cepit Crassianaeque stragis punitor extitit, cum interim, cuius vita triumphavit, mors Papia lege damnata est: namque patrem illius, nihil ad se pertinentia civis Romani iura complexum Sabelli iudicio petitem redire in pristinas sedes coegerunt. Ita M. Perpenae nomen adumbratum, falsus consulatus, caliginis simile imperium, caducus triumphus, aliena in urbe improbe peregrinatus est"; (9) this law was undoubtedly in Cicero's mind when he wrote, *De leg. agr.* i. 4. 13: "Hic tamen excipit Pompeium simillime, ut mihi videtur, atque ut illa lege, qua peregrini Roma eiciuntur, Glaucippus excipitur."

Of these passages, the first, written by a scholiast, asserts explicitly that Archias was being prosecuted on the ground that he had illegally assumed the rights that belonged exclusively to Roman citizens. The second scholium, no doubt written by the same hand, is less convincing, but contains one or two fairly clear indications. The word *causa* is used more appropriately of a suit at law than of an investigation. Also the interesting fact that the case was heard by Q. Cicero in his praetorship is suggestive of the situation, but is not conclusive. The difficulty here lies in the fact that we do not know the functions of a single praetor of this year. The names of four of the praetors are known, namely, Quintus Cicero, Julius Caesar,

M. Calpurnius, and C. Vergilius. Probably also M. Valerius Messala held the office in this year. We are told that Q. Cicero went to Bruttium, undoubtedly early in the year, to subdue the remaining Catilinarian conspirators,<sup>1</sup> but no further information is given in regard to his duties or functions during the year. Our ignorance on these points is particularly unfortunate, for if we had as much information about the activities of the praetors of this year as we have about those of other years the question of the contents of the Papian law might be settled without further difficulty.

As if to offset the statements made by the scholiast, the sentence cited from Dio Cassius asserts very clearly that the object of the law of Papius was the expulsion of those who did not have legal residence in Italy. Now this introduces an interesting new phase of the matter. Since the enactment of the Licinian-Mucian law the franchise had been extended to almost all inhabitants of Italy. As a result, all of these would be exempt from the operation of a law passed at the date of the Papian law. And yet whatever decision one may reach concerning the purpose of the law of Papius, nobody can believe that Dio's opinion is correct. It would be absurd to think that for a period of at least fifteen years inhabitants of the provinces, as well as those who lived outside the Roman Empire, were forbidden to take up their residence in Rome. And yet that is what we are forced to believe if we accept the statement of Dio. There were undoubtedly many persons from all parts of the civilized world living in Rome in these years, and no effort was made to expel them. Naturally the five known cases arising under this law are concerned with persons who came from the provinces or from beyond the empire. Archias was born in Antioch, then outside the Roman Empire; Balbus was born in Gades, a city in one of the provinces of Spain; another inhabitant of Gades was prosecuted before the case of Balbus arose;<sup>2</sup> Cassius came from Messana, in the province of Sicily;<sup>3</sup> a freedman of Gabinius, called Antiochus, is unknown, but the

<sup>1</sup> Orosius vi. 6.

<sup>2</sup> Cic. *Balb.* 32: "ipsae [i.e., leges Romanae] enim te a cognitione sua iudicio publico reppulerunt." It should be noted that those who regard these cases as mere investigations hold that this person was a Roman citizen who had lost his citizenship as the result of a criminal conviction. But in that case he would have no right to appear as a prosecutor in a Roman court.

<sup>3</sup> Cic. *Balb.* 38, 52.

name implies that he was a slave from Syria, which had been recently organized as a province, and of which Gabinius had been governor.

Cicero mentions the Papian law four times by name. In the letter to Atticus he simply narrates an interesting episode, but the word *condemnarunt* is highly significant, for it clearly implies a criminal prosecution, and not a mere investigation. The other three passages point decisively to a connection between the law of Papius and the rights of citizenship, in such a way that the contents of the passages cited are quite out of harmony with the idea that the law was intended to secure the departure of aliens from Rome. In the oration for Archias he says nothing about expulsion, but asserts that names had fraudulently appeared in municipal lists, and it is to be presumed that they had been transferred thence to the lists of the Roman censors, and should be expunged. Indirectly this remark is of considerable importance. Cicero expresses his surprise, or expects his hearers to be surprised, at the fact that even after the enactment of the Papian law some aliens had secured the fraudulent insertion of their names in these lists. The surprising thing is that they should have ventured to do this in spite of the Papian law. But if the law contemplated only a general expulsion of foreigners, they would have everything to gain and nothing to lose by this act. For if they succeeded in avoiding the suspicion of having illegally inserted their names in the municipal lists, they might make it appear that they were citizens, and thus escape expulsion. On the other hand, if their very act was an offense, and might lead to a criminal prosecution, it would be surprising that they should take such a risk, but apparently that is just what they did. Hence the speaker's surprise at their boldness. When Cicero, in the speech for Balbus, says that many had received the rights of citizenship, and that none was ever accused of false assumption of civic rights, on the ground of the refusal of his native town to ratify his citizenship, or because of special agreements in a treaty with Rome, his words would be utterly meaningless in this speech unless the great feature of the Papian law was that it made provision for prosecutions because of an alleged usurpation.

In the *De officiis* Cicero seems to imply a second element in the law. He recognized the propriety of forbidding the franchise to those

not legally qualified; at the same time he says that the laws of Pennus and Papius were broader in their application than that of Crassus and Scaevola. How this can be reconciled with the other accounts of the law by Cicero is not clear, but it may be suggested, assuming that Cicero is here careful in his language, that Papius was responsible for two enactments. The first took cognizance of a definite act that was illegal, namely, the assumption of the rights of a Roman citizen by one to whom they had not been granted in any of the ordinary ways. But when this proved tedious and difficult of execution, a second proposal was made, to the effect that all non-residents of Italy should be expelled. Such a law would be more easily enforced in any specific case, but if it was actually attempted it was certainly allowed to lapse very quickly, and only the other portion of this legislation remained in force. This interpretation suits admirably the words of Cicero in his speech for the Agrarian law. There he uses the present tense *eiciuntur*, which would be impossible unless actual expulsion were being practiced.

It is difficult to make much out of the story told by Valerius Maximus. He narrates the pathetic history of M. Perpenna, who was consul in 130 B.C., and died in the following year. Thus, in any case, the words *ante quam* cannot be taken literally. Moreover, it was his father who was condemned and exiled from the city. It is therefore quite impossible that he should have been condemned under the Papian law. For this reason it has been suggested that *Iunia lege* should be substituted for *Papia lege*, and that the elder Perpenna was prosecuted on a charge of extortion, and not because of any connection with a foreign origin. In that case the phrase *in pristinas sedes* need cause no difficulty, for the name seems to show that the family was of Etruscan descent, and this man probably went back to the early home of his family after his condemnation. Valerius seems to be in error on a further point. He implies a severe penalty upon conviction under the Papian law. In no other place do we derive the idea that there was a penalty beyond exclusion from civic privileges. The first indication of a definite punishment arises in the reign of Claudius, who is said to have fixed the penalty of death upon one who was found guilty of this offense.<sup>1</sup> Omitting, therefore,

<sup>1</sup> Suet. *Claud.* 25: "civitatem Romanam usurpantes in campo Esquilino securi percussit"; *ibid.* 15: "peregrinitatis reum . . . togatumne an palliatum dicere

the story of Perpenna, the scholiast in two places and Cicero in three give the narrower interpretation of the scope of the Papian law, while Dio Cassius and two passages in Cicero seem to express a different view. With this divergence in the sources, it becomes necessary to turn to the two speeches of Cicero delivered in actual cases which arose, and see what the internal evidence may be that will be of assistance.

So far as the facts can be ascertained, the form of trial in the cases arising under the Papian law was the form prevailing in the criminal courts. The procedure to some extent resembled that which would probably be adopted for an official hearing or a public investigation. But the parallel breaks down in several respects.

Cicero calls the case in which Archias was concerned a *quaestio legitima* and a *iudicium publicum*,<sup>1</sup> and the similar case of the unnamed prosecutor of Balbus is also called a *iudicium publicum*.<sup>2</sup> This is the ordinary expression for a criminal case. It is a trial for the determination of a matter which had been the definite subject of legislation, or of a senatorial decree,<sup>3</sup> and is used in contrast with *iudicium privatum*, which sometimes occurs in the sense of a private suit.<sup>4</sup> Thus, Julius Caesar legislated upon the subject of rioting and upon that of assault, and the two offenses were distinguished by the names *vis publica* and *vis privata*.<sup>5</sup> Other variations of the name are *crimen legitimum*<sup>6</sup> and *quaestio publica*,<sup>7</sup> both meaning a criminal suit. It is necessary, therefore, to assume that the expression *quaestio legitima*, which Cicero uses as a synonymous term, also means a criminal case. And this is upheld by the use of the term in the only other place where it seems to occur, for it there describes a criminal charge of poisoning.<sup>8</sup>

causam oporteret"; Arrian *Diss. Epict.* iii. 24. 24: οἱ τῆς Ῥωμαίων πολιτείας καταψευδόμενοι κολάζονται πικρῶς.

<sup>1</sup> *Arch.* 3.

<sup>2</sup> *Balb.* 32.

<sup>3</sup> Macer, *Dig.* xlvii. 15. 3. 3.: "iudicium publicum non est, quia neque lege aliqua de hac re cautum est, neque per senatus consultum." Cf. Papinian, *Dig.* i. 21. 1: "cum publici iudicii habeant exercitationem lege vel senatus consulto delegatam." Cf. also *Dig.* xlviii. 1. 1: "non omnia iudicia, in quibus crimen vertitur, et publica sunt, sed ea tantum, quae ex legibus iudiciorum publicorum veniunt."

<sup>4</sup> Ulpian, *Dig.* xlvii. 15. 1: "sive privato iudicio sive publico praevaricatus sit."

<sup>5</sup> *Dig.* xlviii. 6; xlviii. 7.

<sup>6</sup> Ulpian, *Dig.* xlvii. 20. 3. 2.

<sup>7</sup> Pomponius, *Dig.* i. 2. 2. 32; Cic. *Cael.* 29.

<sup>8</sup> Cic. *Cluent.* 2: "legitimae veneficii quaestionis."



Still more conclusive that the cases of Archias and Balbus were based on criminal charges is Cicero's use of the word *reus*.<sup>1</sup> The scholiast uses the same word in describing the Archias situation. Of course the word can be used of both public and private cases, but the essential fact, wherever the word occurs in forensic literature, is that it always denotes the defendant.<sup>2</sup> It is impossible to assume that Archias and Balbus were prosecuted in private suits, even under the supposition that the Papian law had the expulsion of foreigners as its sole object. According to this hypothesis we should be forced to believe that, when the order came for foreigners to depart from Rome, Archias remained quiet until suit was brought against him to compel him to obey the order. But this is quite contrary to all accepted belief regarding the procedure under the laws to expel foreigners. It is commonly held that the names of those persons of foreign birth who were required to leave were entered in a list, and that one whose name appeared there had the right to protest. In these circumstances Archias would be in the position of one protesting rather than in that of a defendant. Perhaps one should not lay too much stress upon the use by Cicero of the words *defendo*<sup>3</sup> and *accuso*,<sup>4</sup> together with the various derivatives of the latter, *accusator*,<sup>5</sup> *accusatus*,<sup>6</sup> and *accusatio*,<sup>7</sup> for they might be used loosely of one who would cause suffering and of one who would be a sufferer in case a suit or an investigation went against him. But it seems impossible to use the phrase *in iudicium vocatus*<sup>8</sup> in any but the technical sense of a person who is a genuine defendant in a criminal suit.<sup>9</sup>

The various expressions relating to the personnel of the court are scarcely conclusive. In the case of Archias the presiding officer was a praetor, and that was true also after the enactment of 177 B.C., when prosecution was threatened against those who refused to obey

<sup>1</sup> *Arch.* 3; *Balb.* 65.

<sup>2</sup> *Cic. De orat.* ii. 43. 183; Festus, p. 289; Quint. vi. 1. 36. The word is frequent in criminal orations; for its use in private cases, cf. *Cic. Rosc. Com.* 15; *Quinct.* 9; but this is rare.

<sup>3</sup> *Balb.* 1.

<sup>4</sup> *Ibid.* 6, 7, 8, 36.

<sup>5</sup> *Ibid.* 49.

<sup>6</sup> *Ibid.* 48.

<sup>7</sup> *Ibid.* 52.

<sup>8</sup> *Ibid.* 6, 48, 65.

<sup>9</sup> The following are examples from Cicero's criminal speeches: *Sext. Rosc.* 113; *In Caec.* 6, 69; *Verr. act. pr.* 35; i. 34, 108; ii. 1, 3, 217; iv. 25, 104; *Font.* 14, 34; *Cluent.* 9, 88, 148, 153; *Rab.* 8, 26, 31; *Sext.* 75; *Cacl.* 1, 47, 72, 78; *Milo* 40. In other speeches, but in the same sense: *De domo* 88; *Deiot.* 31; *Phil.* i. 21.

the executive decree that they should leave Rome. The jury is addressed regularly by the term *iudices*.<sup>1</sup> In civil cases the ordinary word for jurors is *recuperatores*,<sup>2</sup> with sometimes a variant phrase *qui in consilio sunt*,<sup>3</sup> although the latter is used also in criminal cases.<sup>4</sup> It is clear that the court was a permanent one, for Cicero mentions a case parallel to that of Balbus, which had been heard by the same jury only a short time prior to the case of Balbus.<sup>5</sup> But there might be a permanent court for investigation, as well as one for prosecution, although an investigating court is not mentioned in 177 B.C. It is equally clear that those who lost their cases in this court were not expelled from Rome, for the citizen of Gades, who later prosecuted Balbus, had himself been tried for the same offense, and had been convicted.<sup>6</sup> And yet he was now in Rome, and was conducting the prosecution of Balbus. Why he took upon himself the burden of this prosecution we are not informed. There is no evidence that one who successfully conducted a prosecution on these grounds gained the citizenship, or any other advantage. In one case the Mamertini, as a state, had prosecuted in Rome one of their own citizens,<sup>7</sup> but in the case of Balbus the people of Gades had given evidence that Balbus was a Roman citizen, and looked with disfavor upon the suit against him.<sup>8</sup> If, then, these cases were merely for the purpose of determining whether a person should be expelled from Rome, the Gaditanus who prosecuted Balbus would have no right to remain in Rome after his own conviction. And if that is true, we are obliged to assume that the Romans generously allowed the banished man to return in order to conduct this case. But that is extremely improbable.

One matter appearing in the trial of Archias, not offered in evidence, but revealed in the arguments of the prosecuting counsel, has seemed to some scholars to point in the opposite direction. It is contended that Grattius argued that Archias was not, even in his own estimation, a Roman citizen, as shown by the fact that he had availed

<sup>1</sup> *Arch.* 1, 3, 28, 32; *Balb.* 2, 4, 7, 8, 10, etc.; *Ad Att.* iv. 18. 4.

<sup>2</sup> *Cic. Tull.* 16, 26; *Caecina* 6, 10, 14, 73, 77.

<sup>3</sup> *Cic. Quinct.* 4: "te et hos, qui tibi in consilio sunt"; 91. Cf. also *Rosc. Com.* 12: "utinam sederet in consilio C. Pisonis."

<sup>4</sup> *Cic. Verr. act. pr.* 29.

<sup>5</sup> *Balb.* 4.

<sup>6</sup> *Ibid.* 32, 41.

<sup>7</sup> *Ibid.* 52.

<sup>8</sup> *Ibid.* 39.

himself of none of the rights that belonged to Roman citizenship.<sup>1</sup> Now it was to Cicero's interest to show that Archias was possessed of the citizenship and had always enjoyed a citizen's privileges with the approval of those with whom he had business, or legal, relations. He offers evidence, therefore, that Archias had made wills, received inheritances, and performed other functions that were permissible only to citizens. It is noteworthy, however, that Cicero does not state that Archias ever voted. Evidently he could not have voted, for his name had never appeared in the censors' lists, and this would exclude him from being assigned to any one of the tribes.

But why should Grattius contend that Archias was not, even in his own estimation, a Roman citizen? The reply is sometimes made that Grattius was trying to prove that Archias was a foreigner, and should, therefore, be expelled from Rome by the operation of the Papian law. And his case would be strongly supported by proving that Archias had never acted the part of a citizen, which would be an admission by Archias himself that he was not qualified so to act. If, however, Grattius were endeavoring to prove that Archias had illegally usurped civic rights, it would be to his interest to admit all the acts of Archias that would tend to show that he had done things which a foreigner was not privileged to do.

But this interpretation misses the whole point of the debate between the prosecution and the defense, and especially fails to translate adequately the two phrases *iam tum* and *eis temporibus*. Grattius challenges the defense to prove that Archias is a citizen. He claims that the defense is incapable of producing the only documentary evidence that would be acceptable and sufficient. The name of Archias was not on record in Heraclia, nor was it in either of the last two censors' lists. This, Grattius maintains, is sufficient proof that

<sup>1</sup> *Arch.* 11 (Clark's text): "Sed, quoniam census non ius civitatis confirmat ac tantum modo indicat eum qui sit census ita se iam tum gessisse, pro cive, eis temporibus *is* quem tu criminari ne ipsius quidem iudicio in civium Romanorum iure esse versatum et testamentum saepe fecit nostris legibus, et adiit hereditates civium Romanorum, et in beneficiis ad aerarium delatus est a L. Lucullo pro consule." Neither Müller nor Baiter and Kayser insert *is*, and Baiter and Kayser change *quem* to *quibus*, and bracket *ita*. Although these changes make a slight difference in the syntax of the phrase *pro cive*, they do not alter the meaning of the sentence essentially. It will be seen from the subsequent argument that the vital points in the sentence are *iam tum* and *eis temporibus*, neither of which is affected by the varied punctuation, or reading, of the best texts.

Archias was not a citizen, and Archias acknowledged it by refraining for many years from active participation in civic affairs. But recently, Grattius says, Archias had begun to regard himself as a Roman citizen, and to usurp the privileges of citizenship, and that is why the Papian law is invoked against him. Cicero replies that Archias was a citizen all the time, but that records of his citizenship could not be produced, and that for sufficient reason. However, Grattius was mistaken in saying that for many years Archias had done nothing to indicate his belief that he was a citizen, for even in those years, *eis temporibus*, he had done many things, and these had been accepted by the Roman officials. There was therefore nothing new in the attitude of Archias, and nothing to criticize in his recent actions which would not apply to his life for nearly thirty years.